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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LARRY CHARLES ARRES, Defendant and Appellant.	E053989 (Super.Ct.No. SWF028852) OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Petersen, Judge. Affirmed.

Blumenthal Law Offices and Brent F. Romney for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Larry Charles Arres of first degree murder, (count 1—Pen. Code, § 187, subd. (a)) and recklessly evading a peace officer (count 2—Veh. Code, § 2800.2). The jury additionally found true a special allegation defendant committed the murder while lying in wait (Pen. Code, § 190.2, subd. (a)(15)) and personally used and intentionally discharged a firearm proximately causing death (Pen. Code, §§ 12022.53, subd. (d), 11932.7, subd. (c)(8)). In a bifurcated proceeding thereafter, the court found defendant guilty of being a felon in possession of a firearm (count 3—Pen. Code, § 12021, subd. (a)(1)) and found true an allegation defendant committed the count 1 offense while out on bail (Pen. Code, § 12022.1). The court sentenced defendant to a determinate term of five years, eight months on counts 2 and 3 and the bail enhancement attached to count 1, an indeterminate term of life without the possibility of parole on the count 1 offense with the lying in wait special enhancement, and an indeterminate term of 25 years to life on the personal use enhancement.

On appeal defendant contends he was deprived of his constitutional right to due process by the particular combination of the court's instruction of the jury with CALCRIM Nos. 521 (first degree murder), 570 (voluntary manslaughter), 625 (voluntary intoxication), and 728 (lying in wait special circumstance). He maintains this combination of instruction was misleading, ambiguous, and confusing with respect to the jury's determination of defendant's intent. In addition, defendant maintains the lying in wait special circumstance is unconstitutional in first degree murder cases based on a theory of premeditation and deliberation, because it does not sufficiently narrow the scope of eligible defendants. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Summer Peterson, the victim's girlfriend, first saw the victim on July 11, 2009, in the late morning or early afternoon. Throughout the day they used methamphetamine and drank alcohol at various locations. They eventually ended up at the victim's house on the Soboba Indian Reservation around 3:00 a.m. on July 12, 2009; they parked in front of the house. A dark blue Chrysler 300 pulled up from behind a container on the victim's property and parked about 20 yards away. Defendant, the victim's cousin, exited the vehicle, walked up to the victim, and asked if he wanted to get high. Defendant; Dominique Vazquez, the mother of defendant's children; the victim; and Peterson went into the victim's house.

They all sat or stood around the kitchen island. They drank and used methamphetamine. At some point Peterson took a call from her roommate. While she was talking with her roommate, defendant and the victim began fighting; they exchanged punches. Peterson told them to stop; she told defendant to go home; defendant refused. They separated and went back to the kitchen island but appeared to remain upset at one another.

Defendant went outside and came back with a rifle, which he laid on the kitchen counter. Defendant later took the gun back outside. Defendant then told Vazquez to go outside; she left. Defendant asked the victim if he wanted to do a line; the victim replied "'If it will get you out of here any faster.'"

Defendant made two lines of methamphetamine on the kitchen island. Defendant rolled up a dollar bill and snorted one of the lines. He then handed the bill to the victim

and said "Do your line, cousin." The victim leaned over to snort the remaining line. Defendant pulled out a handgun and shot the victim in the back of his head. The victim fell to the floor.

Defendant ran out the back door. Peterson took the victim's keys out of his pocket. She took the victim's car to drive home. On her way home, she spoke to the guard at the gate to the reservation; she told him to get an ambulance because someone at the victim's house had been shot. Peterson asked her roommate to call 911. Peterson eventually got on the phone and told the operator, "It was his cousin that shot. They . . . got in an altercation. They just got in a fight and they were fighting in the kitchen and then they stopped fighting and they were talking and then he said well I'm gonna leave now and [the victim] turned his back on him and [defendant] just shot him in the back of the head."

The gunshot wound to the victim's head had an "entrance wound behind his left ear, and exit wound through the right temple, and then it went through the brain." The entrance wound was near contact, meaning the gun was "within an inch or two inches" of the victim's head when fired. The coroner determined the victim's death to be a gunshot wound to the head.

Scot Davis, a detective with the Beaumont Police Department, received information sometime after 7:30 a.m. on July 12, 2009, that the Riverside County Sheriff's Department (RSD) was looking for a white Denali pickup truck in regard to a homicide investigation. Detective Davis encountered the vehicle, confirmed the license plate with dispatch, followed it as he awaited the arrival of additional units, and activated

his siren and lights when those units arrived. Defendant led the officers on a pursuit during which he exceeded 120 miles per hour. Detective Davis eventually terminated his pursuit of defendant to allow the RSD to take over.

Marek Janecka, an investigator for the RSD, received a report shortly after 7:30 a.m. on July 12, 2009, that Beaumont police were in pursuit of a white GMC pickup truck. When Investigator Janecka arrived, two Beaumont police vehicles were already in pursuit with their sirens and lights activated. Investigator Janecka came up behind them. Defendant was traveling at over 100 miles per hour on the freeway.

Beaumont Police requested RSD take over the pursuit; Investigator Janecka turned on his lights and sirens and took point. He requested a spike strip be deployed; one was. Defendant drove over the spike strip, which resulted in the disintegration of his tires; defendant was starting to drive on the rims of his tires. Defendant entered the Soboba Indian Reservation by breaking through the security gate. He stopped at his father's house and ran inside. Defendant was later apprehended; no one else was inside the home.

Defendant's expert witness Patrick MacAfee, a psychotherapist specializing in drug and alcohol rehabilitation, testified that long-term, chronic methamphetamine users have severely impaired short term memory, are paranoid, and impulse driven. The use of copious amounts of methamphetamine and alcohol within a relatively short period of time would prevent the user from thinking clearly. It would also lead the person to want to flee from any conflict. Nonetheless, long term users can still think, make decisions for themselves, and form intent, even to kill.

DISCUSSION

A. COMBINATION OF INSTRUCTION WITH CALCRIM NOS. 521, 570, 625 AND 728

Defendant contends instruction of the jury with CALCRIM Nos. 521 (first degree murder), 570 (voluntary manslaughter), 625 (voluntary intoxication), and 728 (lying in wait special circumstance) deprived him of due process because, on the issue of the requisite intent, they were misleading, ambiguous, and confusing. Specifically, defendant maintains that some of the instructions required the jury to make a quantitative decision as to whether sufficient time elapsed for defendant to have formed the intent to kill while other instructions focused the jury on a qualitative analysis of the manifestation of such intent. We find defendant forfeited the issue by failing to object to the instructions or request modification below. Addressing the merits, we find no error. Regardless, any error was harmless.

As instructed, CALCRIM No. 521, provides: "The defendant has been prosecuted for first degree murder under two theories: One, the murder was willful, deliberate and premeditated; and, two, the murder was committed while lying in wait. [¶] Each theory of first degree murder has different requirements and I will instruct you on both. [¶] You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory. [¶] The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully

weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death. [¶] *The length of time the person spends considering whether to kill does not alone determine* whether the killing is deliberate and premeditated. *The amount of time required* for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated; on the other hand, a cold, calculated decision to kill can be reached quickly. *The test is the extent of the reflection, not the length of time*. [¶] The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if: [¶] One, he concealed his purpose from the person killed; two, he waited and watched for an opportunity to act; and, three, then, from a position of advantage, he intended to and did make a surprise attack on the person killed. [¶] The lying in wait does not need to continue for a particular period of time, but *its duration must be substantially enough to show a state of mind equivalent to deliberation or premeditation*." (Italics added.)

CALCRIM No. 570 provides, in pertinent part: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of sudden quarrel or in the heat of passion if: [¶] One, the defendant was provoked; two, as a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and, three, the provocation

would have caused a person of average disposition to act rashly and without *due deliberation*, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without *due deliberation and reflection*. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and *immediate influence of provocation* as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation *may occur over a short or long period of time*. [¶] . . . [¶] *If enough time passed between the provocation and the killing* for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

CALCRIM No. 625 provides: "You may consider evidence, if any, of the defendant's voluntary intoxication *only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation*, or the defendant willfully intended to evade an officer as alleged in Count 2. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of

that effect. [¶] *You may not consider evidence of voluntary intoxication for any other purpose*." (Italics added.)

CALCRIM No. 728 provides: "The lying in wait does not need to continue for any particular period of time, but its *duration* must be *substantial* and must show a state of mind equivalent to deliberation or premeditation." (Italics added.)

During deliberations, the jury posed the following question: "The instructions for first degree murder are very clear and detailed. What is the legal definition[] for second degree murder[?]" The court responded, "Please refer to CALCRIM instruction number 521, the second to last paragraph which states: 'The requirement for second degree murder based on express or implied malice are explained in CALCRIM No. 520, first or second degree murder with malice aforethought.'" The jury later asked, "Is the difference between first degree murder and second degree murder lying in wait? If not what is the difference[?]" The court responded "No. First degree murder can be found under two (2) theories. See CalCrim #521 for explanation on definition of first degree murder. [¶] Second degree murder based on express or implied malice [is] explained in CalCrim #520."

Defendant argues the italicized language in the jury instructions above forced the jury to decide defendant's intent to kill through a prism of contradictory metrics: one, requiring that he have considered the killing over a "substantial" temporal "duration"; and two, that he may be deemed to have manifested the intent so long as he made a decision substantively, without regard to the time elapsed. He notes the voluntary intoxication instruction would appear to be limited in application only to a theory of

premeditated and deliberative murder because a first degree murder theory of lying in wait has an additional intent element not addressed in CALCRIM No. 625, effectively rendering its applicability to the latter theory nugatory. Defendant also complains the confusion engendered by the combination of instructions led to a guilty verdict on first degree murder, with a true finding on the lying in wait special circumstance, even where the People failed to adduce any evidence of defendant's motive.

"Defendant's failure to object to the instruction[s] below . . . forfeits the claim on appeal. [Citations.]" (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) Likewise, defendant's failure to seek modification of the instructions in a manner in which he would deem them acceptable forfeits his argument on appeal. (*People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023.) The court below gave defendant every opportunity to object or request modifications of the instructions it intended to give; defendant failed to avail himself of these opportunities. Indeed, even on appeal, defendant acknowledges that "it is not clear what an appropriate and accurate jury instruction would consist of." Thus, defendant has forfeited the issue on appeal.

Nonetheless, in addressing the merits of defendant's claim, we find no error. In assessing whether the jury instructions given were erroneous, the reviewing court "'"'must consider the instructions as a whole [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]"' [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148-1149.) Simply because juror instructions are complicated does not mean the jury was likely to misunderstand them. (*People v. Pearson* (2012) 53 Cal.4th 306, 324.)

In *People v. Stevens* (2007) 41 Cal.4th 182, the defendant argued the lying in wait special circumstance instruction was constitutionally infirm because it was confusing. In particular, the defendant maintained that "'[i]f the temporal element is . . . equivalent to that of first-degree murder, then the statute loses all claim to performing a rational narrowing function.'" (*Id.* at p. 203.) The court responded, "It is not clear whether he means first degree murder on a theory of premeditation and deliberation, or lying in wait, *but in either case* the claim fails. In distinction with premeditated first degree murder, the lying-in-wait special circumstance requires a physical concealment or concealment of purpose and a surprise attack on an unsuspecting victim from a position of advantage. [Citations.] Thus, *any overlap between the premeditation element of first degree murder and the durational element of the lying in wait special circumstance does not undermine the narrowing function of the special circumstance*. [Citation.]" (*Id.* at pp. 203-204, italics added.) The court further noted that CALCRIM No. 728 "'requires a period of time long enough to show a 'state of mind equivalent to premeditation or deliberation.' [Citation.]" (*Stevens*, at p. 204.)

Therefore, there is no inherent discrepancy between the apparent qualitative and quantitative analyses required by the instructions. Those instructions appearing to require a certain temporal duration may reach a point, in a particular case, where they overlap with the instructions that require only a substantive decision. Thus, the qualitative and quantitative determinations required by the instructions are not mutually exclusive and may constitutionally be applied to an individual case. The instructions, as given, did not impinge on defendant's constitutional right to due process.

Nevertheless, we do not believe this is such a case where the analysis required by the instructions did overlap. In finding the lying in wait special circumstance true, the jury necessarily rejected defendant's contention that he was voluntarily intoxicated to the point that he was incapable of manifesting the requisite intent to kill the victim while concealing his purpose, watching and waiting for an opportunity to act, and making a surprise attack upon the victim from a position of advantage. (CALCRIM No. 728.) Moreover, the murder occurred sometime after the physical altercation between defendant and the victim. Thus, the motive for the murder could have been the fight itself.

Finally, even if the instructions were misleading, any error was harmless beyond a reasonable doubt. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165.) Here, the People adduced evidence at trial that defendant and the victim became embroiled in fisticuffs. A *minimum* of 10 minutes would appear to have elapsed between the end of the fight and defendant's shooting of the victim, during which defendant left to retrieve the rifle (presumably from his car), showed the victim the rifle, returned the rifle to his car, returned to the kitchen, and drank a number of beers. Defendant then asked the victim if he wanted to snort a line of methamphetamine, made the lines, snorted one himself, handed the victim the rolled up dollar, and waited until the victim bent over to snort the line before pulling out a handgun and shooting the victim in the back of the head. The evidence adduced at trial and apparently believed by the jury overwhelmingly demonstrated that defendant orchestrated an opportunity to kill the victim from a position

of advantage. Thus, there was no reasonable likelihood the verdicts would have differed had the jurors been instructed in some other less "misleading" fashion.

B. CONSTITUTIONALITY OF CALCRIM NO. 728

Defendant contends instruction with CALCRIM No. 728 in cases where at least one theory of first degree murder is premeditation and deliberation is unconstitutional, because the special circumstance instruction does not sufficiently narrow the scope of eligible defendants. However, the California Supreme Court had already decided this issue to the contrary. We are bound by its holdings. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In *People v. Gutierrez* (2002) 28 Cal.4th 1083, the defendant contended "the special circumstance of lying in wait is unconstitutional because there is no significant distinction between the theory of first degree murder by lying in wait . . . and the special circumstance of lying in wait, and that the special circumstance therefore fails to meaningfully narrow death eligibility." (*Id*. at p. 1148.) The court noted "[w]e have repeatedly rejected the same contention with respect to analogous facts and circumstances . . . [Citations.]" (*Ibid*.) "The distinguishing factors . . . that characterize the lying-in-wait special circumstance constitute 'clear and specific requirements that sufficiently distinguish *from other murders* a murder committed while the perpetrator is lying in wait, so as to justify the classification of that type of case as one warranting imposition of the death penalty.' [Citation.]" (*Id*. at p. 1149, italics added.)

With respect to the specific issue before us, as noted above, the court in *People v. Stevens, supra*, 41 Cal.4th 182, held that CALCRIM No. 728 survived constitutional

scrutiny because "[i]n distinction with premeditated first degree murder, the lying-in-wait special circumstance requires a physical concealment or concealment of purpose and a surprise attack on an unsuspecting victim from a position of advantage. [Citations.] Thus, any overlap between the premeditation element of first degree murder and the durational element of lying in wait special circumstance does not undermine the narrowing function of the special circumstance. [Citation.] Moreover, . . . concealment of purpose inhibits detection, defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise. [Citations.]" (*Id*. at pp. 203-204.) Thus, defendant's contention fails.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RICHLI
Acting P. J.

CODRINGTON
J.